

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

VIVIAN ALLEN,

06-CV-1251-BR

Plaintiff,

OPINION AND ORDER

v.

MICHAEL J. ASTRUE,  
Commissioner of Social  
Security,

Defendant.

**TIM WILBORN**  
Wilborn Law Office, P.C.  
19093 S. Beavercreek Road, PMB # 314  
Oregon City, OR 97045  
(503) 632-1120

Attorney for Plaintiff

**KAREN J. IMMERGUT**  
United States Attorney  
**BRITANNIA I. HOBBS**  
Assistant United States Attorney  
1000 S.W. Third Avenue, Suite 600  
Portland, OR 97204-2902  
(503) 727-1024

**MICHAEL McGAUGHRAN**

Office of the General Counsel

**CAROL A. HOCH**

Special Assistant United States Attorney

701 Fifth Avenue, Suite 2900 MS/901

Seattle, WA 98104-7075

(206) 615-2684

Attorneys for Defendant

**BROWN, Judge.**

Plaintiff Vivian Allen seeks judicial review of a final decision of the Commissioner of the Social Security Commission in which he denied her application for Supplemental Security Income (SSI) payments under Title XVI of the Social Security Act. This Court has jurisdiction to review the Commissioner's decision pursuant to 42 U.S.C. § 1383(c)(3).

Following a review of the record, the Court **REVERSES** the Commissioner's decision and **REMANDS** for further proceedings.

#### **BACKGROUND**

Allen was age 48 on the date of the Commissioner's decision. She completed the eighth grade and worked in the past as a janitor, housekeeper, and production worker. She last worked in October 1999. Tr. 70, 71, 76.<sup>1</sup>

---

<sup>1</sup> "Tr." refers to the official transcript of the administrative record filed by the Commissioner.

In her application for SSI, Allen alleged disability due to head injuries, mental illness, hepatitis B and C, and swelling in her feet and legs. Tr. 70. Her application has a constructive filing date of April 12, 2002. Tr. 63. She cannot recover payments for any period of disability before that date. See 20 C.F.R. §§ 416.203, 416.501. See also Social Security Ruling (SSR) 83-20.

#### **BURDEN OF PROOF**

The claimant has the burden of establishing disability. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9<sup>th</sup> Cir. 1999). See also *Roberts v. Shalala*, 66 F.3d 179, 182 (9<sup>th</sup> Cir. 1995). To meet this burden, she must demonstrate the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months." 42 U.S.C. § 1382c(a)(3)(A). The burden shifts to the Commissioner only when an adjudication proceeds to the final step of the five-step sequential analysis described in 20 C.F.R. § 416.920 in which the Commissioner must show a significant number of jobs exist in the national economy that the claimant can do. *Bowen v. Yuckert*, 482 U.S. 137, 141-42 (1987).

### **STANDARD OF REVIEW**

The district court must affirm the Commissioner's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record as a whole. 42 U.S.C. § 405(g). *See also Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir. 1995). "Substantial evidence means more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.*

If substantial evidence can reasonably support either affirming or reversing the Commissioner's decision, the court may not substitute its judgment for that of the Commissioner. *Batson v. Comm'r of Soc. Sec.*, 359 F.3d 1190, 1192 (9<sup>th</sup> Cir. 2004). The Commissioner's decision must be upheld even if the "evidence is susceptible to more than one rational interpretation." *Andrews*, 53 F.3d at 1039-40.

### **ALJ'S FINDINGS**

To determine disability, the ALJ applied the five-step sequential procedure described in 20 C.F.R. § 416.920. *See Yuckert*, 482 U.S. at 140. Allen challenges the ALJ's evaluation of the evidence and findings at Steps Three and Five of the decision-making sequence.

At Step Three, the regulations require a conclusive presumption of disability if the ALJ determines the claimant's impairments meet or equal any "of a number of listed impairments that the [Commissioner] acknowledges are so severe as to preclude substantial gainful activity." *Yuckert*, 482 US at 140-41. See also 20 C.F.R. § 416.920(d). The criteria of the listed impairments (Listings) are enumerated in 20 C.F.R. Part 404, Subpart P, Appendix 1 (Listing of Impairments).

Here the ALJ found Allen was disabled by a combination of mental impairments and drug and alcohol dependence that satisfied the criteria in the Listing of Impairments for Listings 12.04 *Affective Disorders*, 12.08 *Personality Disorders*, and 12.09 *Substance Addiction Disorders*.

A claimant, however, cannot be found disabled if drug addiction or alcoholism is a contributing factor material to the determination of disability. 42 U.S.C. § 1382c(a)(3)(J). See also *Bustamante v. Massanari*, 262 F.3d 949, 955 (9<sup>th</sup> Cir. 2001). Drug or alcohol addiction are "contributing material factors" when the claimant's remaining limitations would not be disabling if the claimant stopped using drugs or alcohol. 20 C.F.R. § 416.935(b).

The ALJ found Allen's impairments would not satisfy any section of the Listing of Impairments if the effects of alcohol and drug abuse were excluded. Thus, the ALJ concluded alcohol

and drug addiction were material factors contributing to the disability determination at Step Three. The ALJ, therefore, excluded the impact of substance dependence from the rest of the decision-making sequence used to determine whether Allen is disabled.

To make findings at Step Five, an ALJ must evaluate the claimant's RFC. A claimant's RFC is an assessment of the sustained, work-related activities that a claimant can still do despite the limitations imposed by her impairments. 20 C.F.R. §§ 416.920(e), 416.945. See also SSR 96-8p.

The ALJ assessed Allen's RFC as follows:

The claimant has the residual functional capacity for a limited range of light exertion work activities when alcoholism with abuse is not a factor in her limitations. She is able to lift and carry up to 20 pounds occasionally and 10 pounds frequently. She is able to stand and walk up to six hours in a workday. She is able to sit up to six hours in a workday. She is able to frequently climb stairs, but is restricted to occasional climbing of ladders or scaffolds. Due to mental disorders (other than alcohol abuse), she is restricted to simple, routine, repetitive work with little public contact.

Tr. 25.

If the ALJ reaches Step Five, he must determine whether the claimant is able to do any work in the national economy. *Yuckert*, 482 U.S. at 141-42. See also 20 C.F.R.

§ 416.920(e),(f). The Commissioner must then show a significant number of jobs exist in the national economy that the claimant can do. *Yuckert*, 482 U.S. at 141-42. If the Commissioner meets this burden, the claimant is not disabled. 20 C.F.R. § 416.920(f)(1).

Here the ALJ determined Allen would not be disabled and could perform work in the national economy if she stopped using drugs and alcohol. The ALJ received testimony from a vocational expert (VE) who identified examples of such work to include assembly-production worker, cleaner/housekeeper, and electronics worker. The ALJ, therefore, concluded at Step Five that Allen was ineligible for SSI payments under Title XVI of the Social Security Act.

#### **DISCUSSION**

Allen contends the ALJ erred by (1) failing to find her disabled at Step Three on the basis that her impairments meet or equal Listing 12.05 *Mental Retardation*, (2) failing to assess her RFC accurately because he excluded limitations in mental function identified by state-agency reviewing psychologists, (3) relying on erroneous VE testimony that identified occupations requiring work activities precluded by her RFC.

**I. Listing 12.05 *Mental Retardation*.**

Allen contends the ALJ should have found her disabled at Step Three because her impairments meet and/or equal the criteria in paragraph C of Listing 12.05 *Mental Retardation*. The claimant bears the burden to establish that she meets or equals the criteria of a Listing. *Sullivan v. Zebley*, 493 U.S. 521, 531 (1990). See also *Tackett v. Apfel*, 180 F.3d at 1100; 20 C.F.R. § 416.926.

Listing 12.05 contains an introductory paragraph with the diagnostic description of mental retardation and four alternative sets of criteria in paragraphs A-D. To meet the criteria of Listing 12.05, a claimant must show her impairments satisfy the diagnostic description in the introductory paragraph and any one of the four sets of criteria. Listing of Impairments § 12.00(A). The introductory paragraph describes mental retardation as significantly subaverage general intellectual functioning with deficits in adaptive functioning. In addition, the evidence must support onset before age 22. Paragraph C requires a claimant to show a valid verbal, performance, or full-scale IQ of 60-70 and a physical or other mental impairment that imposes an additional and significant work-related limitation in function.

Allen relies on paragraph C. To support her position, Allen cites the psychological evaluation of Donna Wicher, Ph.D., performed in April 2004. Tr. 650-59. Dr. Wicher administered a



battery of psychological measures, including intelligence tests on which Allen achieved a verbal IQ score of 66, a performance IQ score of 78, and a full-scale IQ of 69. Tr. 653. Allen asserts the combination of her IQ scores and her other severe impairments meets the criteria for the Listing.

Dr. Wicher found Allen's adaptive functioning exceeded that which would be consistent with mental retardation. Dr. Wicher opined despite test scores at the upper end of the mild mental retardation range, Allen's "overall level of adaptive functioning does suggest that her functioning is actually within the Borderline Range of intellectual ability." Tr. 656. The Court concludes, however, Dr. Wicher's evaluation does not satisfy the diagnostic description in the introductory paragraph or the criteria of paragraph C.

Psychological evaluations conducted by other doctors yielded conclusions similar to those of Dr. Wicher. For example, Jeff Guardalabene, Psy.D., obtained a full-scale IQ of 69, but he concluded other measures of Allen's ability and her adaptive functioning showed that she functioned at the Borderline range of intellectual function. Tr. 478. An evaluation by Katie Ugolini, Ph.D., did not reveal any deficits in registration, language, or construction. Allen was able to correctly follow a three-step command and track simple and complex ideational material without significant difficulty, and her recent and remote memory appeared

to be intact. Dr. Ugolini opined Allen "functions within the low-average range of intellectual abilities." Tr. 487.

The ALJ relied on these evaluations when he concluded Allen "demonstrated better adaptive functioning and has better concentration and memory function than a person with mild retardation." Tr. 22. In addition, the evidence does not support or negate onset prior to age 22. Allen reported leaving school after being expelled for fighting during the ninth grade. She did not attend special-education classes and was not held back a grade. Tr. 76, 485. The record does not reflect whether her failure to complete school resulted from intellectual deficits, substance addiction, the unfortunate history of sexual and physical abuse that she suffered during her youth, or other causes.

With respect to the criteria in paragraph C, Allen's attorney overstates the record when he asserts "the ALJ has accepted that Plaintiff's IQ scores as obtained through Dr. Wicher's testing are valid." Pl.'s Opening Br. 12. In fact, neither Dr. Wicher nor the ALJ accepted the IQ scores as valid measures of Allen's intellectual functioning. Dr. Wicher observed Allen scored considerably higher on memory testing than would be consistent with the IQ scores she achieved. Allen also demonstrated better concentration and pace than a person with mild mental retardation and did not exhibit limitations in daily

activities consistent with intellectual functioning in the mentally-retarded range. Tr. 22, 657. In fact, Dr. Wicher opined "Ms. Allen is of somewhat modest intellectual functioning, but her level of intelligence is sufficient to allow her to work." Tr. 657. Allen's personality profile also added doubt to the validity of her testing. Dr. Wicher opined Allen's testing most likely reflected her attempt to exaggerate her psychological deficits. Tr. 654. Moreover, Dr. Wicher diagnosed Allen's intellectual functioning at the Borderline level, which indicates Dr. Wicher did not accept the IQ test scores as a valid indication that Allen has mild mental retardation. See Tr. 656. The ALJ accepted Dr. Wicher's assessment and found Allen demonstrated greater intellectual functioning than a person with mild mental retardation. Tr. 22.

Allen relies on the evaluation administered in August 2000 by Caleb Burns, Ph.D. Allen achieved IQ scores in the 50s, which is well within the mentally retarded range, but Dr. Burns found these scores "very suspiciously low." Tr. 197-98. He did not believe they were valid because Allen gave poor effort and smelled of alcohol. Tr. 197-98. The ALJ reviewed Dr. Burns's findings, but he gave greater weight to the assessments of Drs. Wicher, Guardalabene, and Ugolini because they had greater knowledge of Allen's alcohol dependence.

Tr. 19, 21. The Court does not find any error in the ALJ's evaluation of Dr. Burns's report.

In summary, Allen failed to meet the requirements of Listing 12.05 because she did not satisfy the diagnostic description in the introductory paragraph or produce IQ scores in the requisite range that were accepted by evaluators as valid. Although her scores during Dr. Burns's evaluation and the lowest scores she achieved during Dr. Wicher's evaluation were in the requisite range, Drs. Burns and Wicher opined the scores did not accurately measure Allen's true intellectual functioning.

Alternatively, Allen argues the ALJ failed to properly consider whether her combined impairments are medically equivalent to Listing 12.05. At 20 C.F.R. § 416.926(b), the regulations set out three ways to establish medical equivalence, but Allen does not indicate which method she satisfies. Instead Allen merely reasserts that her findings meet the criteria of Listing 12.05.

Under the first of the three methods, if a claimant has an impairment described in the Listing of Impairments but does not exhibit all of the required findings at the required level of severity, the claimant can establish medical equivalence by showing other findings at least of equal medical significance to the required criteria. 20 C.F.R. § 416.926(b)(1). For example, in the absence of a valid IQ test score, the claimant could

substitute another reliable measure of intellectual function of equal medical significance. Allen does not satisfy this method because all of the findings suggest her intellectual functioning exceeds the level required for the Listing. The only exception relates to alcohol addiction and drug abuse, which, as noted, cannot be the basis for her disability.

The second method pertains to impairments not described in the Listing of Impairments and does not apply to Allen's assertion that she has mild mental retardation. See 20 C.F.R. § 416.926(b)(2).

Under the third method, if a claimant has a combination of impairments but does not exhibit all of the required findings for any Listing, the claimant can establish medical equivalence by comparing her findings to the required findings for closely analogous Listings. 20 C.F.R. § 416.926(b)(2). If Allen invokes the third method, the most closely analogous Listing is 12.05. Again, however, the findings in the record demonstrate her intellectual function exceeds mild mental retardation.

Allen also contends the ALJ's opinion was cursory, and he failed to explain adequately why Allen's impairments do not equal a Listing. As noted, the ALJ relied primarily on the opinion of Dr. Wicher and found Allen had demonstrated better adaptive functioning, concentration, and memory than a person with mild mental retardation and had sufficient intellectual ability to

work. Tr. 22. Thus, in the absence of a plausible theory as to how Allen's impairments satisfied one of the three methods of showing medical equivalence pursuant to 20 C.F.R. § 416.926(b), the ALJ's explanation was sufficient. See *Lewis v. Apfel*, 236 F.3d 503, 514 (9<sup>th</sup> Cir. 2001)(ALJ's failure to compare findings to a Listing was not error when claimant did not assert any theory as to how his combined impairments medically equaled the Listing).

Based on the foregoing, the Court finds substantial evidence in the record to support the ALJ's conclusion that Allen's impairments do not meet or equal the criteria for Listing 12.05 and that the ALJ applied correct legal standards in his Step-Three determination. Allen's argument relies on a different interpretation of the evidence, but this Court is not free to substitute an alternative interpretation for that of the Commissioner. See *Batson*, 359 F.3d at 1190. See also *Andrews*, 53 F.3d at 1039-40.

## **II. RFC Assessment.**

Allen contends the ALJ erred by failing to explain the weight he gave to the opinion of Dick Wimmers, Ph.D., and Dorothy Anderson, Ph.D. Drs. Wimmers and Anderson reviewed Allen's medical records and assessed her mental residual functional capacity, but they did not treat or examine her.

In August 2002, Dr. Wimmers opined Allen's social functioning was moderately limited in her ability to get along with coworkers or peers without distracting them or exhibiting behavioral extremes. Tr. 494-95. Dr. Anderson affirmed this finding in January 2003. Tr. 495. The ALJ did not reflect this finding in his RFC assessment and did not include it in the hypothetical given to the VE. Tr. 25, 816.

The Commissioner relies on psychological consultants to make findings of fact about the nature of a claimant's impairments and the severity of the functional limitations they impose. 20 C.F.R. § 416.927(f). See also SSR 96-6p. Such reviewing sources do not treat or examine the claimant. Thus, their opinions are held to stricter standards and are given weight only to the extent that they are supported by the record and consistent with the record as a whole. SSR 96-6p. The ALJ is not bound by the findings of reviewing consultants, but he may not ignore their opinions and must explain the weight given to their opinions. *Id.*

The ALJ stated he had considered the opinions of non-examining medical sources, including state-agency doctors, but he chose to give greater weight to the assessments of Drs. Wicher, Guardalabene, and Ugolini. Tr. 21. The assessments of Drs. Guardalabene and Ugolini, however, predated the assessment of the agency psychologists and were available to them for

review. Presumably Drs. Wimmers and Anderson weighed these assessments when they determined Allen's limitations.

Dr. Guardalabene did not address Allen's social deficits in his evaluation. Tr. 470-78. Although Dr. Ugolini did not mention Allen's social difficulties directly, she found Allen experienced hypervigilance, anger dyscontrol, heightened irritability, and exaggerated startle response. Tr. 480. These findings do not discredit the conclusion that Allen has difficulty working closely with coworkers. Thus, the ALJ's reliance on the evaluations of Drs. Guardalabene and Ugolini does not explain why the ALJ did not give any weight to the agency psychologists' opinion that Allen required limited close contact with coworkers.

Dr. Wicher administered her evaluation after Drs. Wimmers and Anderson reported their findings. The ALJ reasonably concluded Dr. Wicher had greater knowledge of Allen's alcohol dependence and the benefit of evaluating Allen during a period of sobriety. Tr. 21. Be that as it may, Dr. Wicher's opinion does not contradict the findings of Drs. Wimmers and Anderson. Dr. Wicher concluded a primary psychological barrier to Allen's sustained employability was "moderate deficits in social functioning due to her tendency to avoid people and get into fights on occasion." Tr. 657. Dr. Wicher further stated Allen has shown a "history of interpersonal conflict with some physical altercations and . . . a tendency to isolate from others."



Tr. 658.

Again, the ALJ's reliance on Dr. Wicher's assessment does not explain why the ALJ did not give any weight to the finding that Allen required work with limited close contact to coworkers.

The Commissioner argues the ALJ's omission was harmless error and that it is unlikely the inclusion of those limitations would have changed the VE's testimony. The Commissioner also asserts the jobs identified by the VE do not require significant interaction with people. The Commissioner relies on the numerical codes for occupations listed in the Department of Labor publication *Dictionary of Occupational Titles* (DOT). The Commissioner explains the DOT codes for occupations include a digit to express the complexity of the required relationships with people in the given occupation. The codes for the three occupations identified by the VE indicate the least complicated relationships with people.

The Court does not agree the DOT codes adequately replace the testimony of a VE. There are only two ways for the Commissioner to satisfy his burden at Step Five: (1) by eliciting testimony from a VE based on a hypothetical question that accurately reflects all of the claimant's limitations or (2) by referring to the Medical-Vocational Guidelines at 20 C.F.R. Part 404, Subpart P, Appendix 2. *Tackett v. Apfel*, 180 F.3d at 1100-01. See also *Andrews v. Shalala*, 53 F.3d at 1043.

The Commissioner appears to propose a third method to meet his burden: by attempting to extrapolate the likely testimony of a VE based on the DOT codes. The Court is not aware of any cases in which courts have accepted this as a valid approach, and this Court declines to do so.

Moreover, the Court does not agree the harmless error standard applies. The Court cannot confidently conclude that fully crediting the findings of Drs. Wimmers and Anderson would be inconsequential to the ultimate determination of whether Allen is disabled. See *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1054-56 (9<sup>th</sup> Cir. 2006)(discusses application of harmless error in Social Security cases).

The ALJ failed to reasonably explain why he did not give any weight to the findings of the state-agency reviewing psychologists. Accordingly, the ALJ's RFC assessment cannot be sustained. In addition, there has not been any testimony from a VE based on hypothetical limitations that accurately reflect Allen's RFC. Under these circumstances, it is appropriate to accept the improperly omitted findings as a matter of law and to remand to obtain a VE's testimony based on an accurate RFC assessment. See *Hammock v. Bowen*, 979 F.2d 498, 504 (9<sup>th</sup> Cir. 1989).

### **III. Vocational Evidence.**

Finally, Allen contends the occupations identified by the VE

require work activities precluded by her RFC, and, therefore, the ALJ relied on erroneous testimony from the VE. It is, however, unnecessary to address Allen's final argument. For reasons already stated, the ALJ must reevaluate Allen's RFC and obtain new VE testimony based on an accurate hypothetical.

Accordingly, the Court remands this matter for the purpose of permitting the Commissioner to reassess Allen's RFC, to obtain VE testimony based on a hypothetical that accurately reflects all of Allen's functional limitations, and to address such other matters as the Commissioner deems appropriate.

#### **CONCLUSION**

For these reasons, the Court **REVERSES** the decision of the Commissioner and **REMANDS** this matter pursuant to sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with this Opinion and Order.

IT IS SO ORDERED.

DATED this 8th day of January, 2008.

/s/ Anna J. Brown

---

ANNA J. BROWN  
United States District Judge